JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term 1957

No. 659

EMILE J. DAIGLE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Emile J. Daigle, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on October 3, 1957.

OPINIONS BELOW

The opinion of the District Court is reported in 149 F.Supp. 409.

The opinion of the Court of Appeals is unreported. It is set forth in the Appendix to this Petition, infra, page 52.

JURISDICTION

The judgment of the Court of Appeals was entered on October 3, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Were the denials of motions for election as to counts in the indictment an abuse of discretion by the Trial Court and therefore a denial of due process as contemplated in the Fifth Amendment to the U. S. Constitution.

2. Were the denials of Motion for Judgment of Acquittal where evidence disclosed only inference on inference a denial of due process under the Fifth Amendment to the U. S. Constitution.

3. Was the denial of Motion for Judgment of Acquittal because of variance of proof and allegation of indictment as to ownership a denial of due process under the Fifth Amendment to the U. S. Constitution.

4. Was not the Court's resolving of inconsistent and antagonistic verdicts returned against the advice of the Court a denial of the Petitioner's right to trial by an impartial jury in violation of Article III, Section 2 (Par. 3) and the Sixth Amendment to the U. S. Constitution.

5. Is not the failure of the United States Court of Appeals for the District of Columbia Circuit to set forth reasons for affirmance where substantial questions are involved a denial of due process under the Fifth Amendment to the U. S. Constitution.

STATUTES INVOLVED

D.C. Code (1951 Ed.) Title 22, Section 1202.

> "If any agent, attorney, clerk, or servant of a private person or copartnership, or any officer, attorney, agent, clerk, or servant of any association or incorporated company, shall wrongfully convert to his own use, or fraudulently take, make way with, or secrete, with intent to convert to his own use, anything of value which shall come into his possession or under his care by virtue of his employment or office, whether

the thing so converted be the property of his master or employer or that of any other person, copartnership, association, or corporation, he shall be deemed guilty of embezzlement, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment for not more than ten years, or both: *Provided, however*, That where the thing, evidence of debt, property, proceeds, or profits be of the value of not more than thirty-five dollars, the punishment shall be by imprisonment for not more than one year or a fine of not more than five hundred dollars, or both."

D.C. Code (1951 Ed.) Title 22, Section 2201. Grand Larceny.

"Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years."

STATEMENT

The Petitioner Emile J. Daigle, 55 years of age at the time of the trial, was a Captain in the Fire Department, having risen to that rank after more than twenty-seven years of service. He became Secretary-Treasurer of the Firemen's Family Relief Association in May, 1949 and continued to function in that capacity until the happening of the events involved in this case. (Tr. 327-328).

The Petitioner was before the District Court under an eight-count indictment charging embezzlement, grand larceny, forgery and uttering in connection with his handling, as Secretary-Treasurer of the Firemen's Family & Fraternal Relief Association (formerly the Firemen's Family Relief Association) of certain death benefits to widows of two firemen. The first four counts of the indictment related to payment to a Mrs. Thrasher and the last four counts to a payment to a Mrs. Ewers.

As to the first four counts involving Mrs. Thrasher the evidence indicated that her husband died on March 10, 1954 and that she made no immediate effort to pursue her rights in connection with the relief organization. That on August 12, 1954, the Petitioner in his official capacity visited Mrs. Thrasher at her home and advised her that she was entitled to a death benefit from the relief association. Certain discussions were had with her at that time as to whether or not her husband left a Will and she indicated that some paper had been left but that she had not been able to find it. The Petitioner advised the lady that unless her husband had left a Will otherwise directing, that she was entitled to $600.00 and he gave her at that time $100.00 in cash on account, got her to endorse her name on the back of the check which check he made out in the amount of $600.00, signed same as Secretary Treasurer, the said check already having been signed by the President of the Association. The Petitioner advised the lady that as soon as possible she should try to find out if any Will had been left by her husband and should make the necessary application for payment; that he would hold the balance of the money to await her performance of such necessary detail. The testimony as related by police officers as to conversations had with the Petitioner following his arrest as well as by the Petitioner himself, indicated that after leaving Mrs. Thrasher he went that same day to The American Security and Trust Company, cashed the check in the amount of $600.00 and then placed $500.00 of the money in the relief association's safe at his home to await the necessary completion of papers by Mrs. Thrasher. On April 18, 1956, not having heard from Mrs. Thrasher, the Petitioner again visited Mrs. Thrasher's home and asked her why she had not made the necessary application and she indicated that she did not understand that such was required. The Petitioner then had her sign as of the original date of August 12, 1954 an application for pay-

ment of benefit and gave to Mrs. Thrasher the sum of $600.00. This was $100.00 in excess of the amount due her and the Petitioner indicated that not having taken a receipt for the $100.00 previously given to her, and she making no mention of it, he did not want to have any difficulty inasmuch as the relief association was about to be absorbed by the Federal Government. Mrs. Thrasher on the stand testified that the Petitioner told her to say that she had had the money for a long time if anyone should ask about it. The Petitioner denied that such statement was ever made.

The evidence relating to counts 5 through 8 involving Mrs. Ewers discloses that Mrs. Ewer's husband died on November 2, 1954; that no effort was made by Mrs. Ewers to collect any benefit to which she might have been entitled; that on April 10, 1956 the Petitioner went to see her at her home and advised that she was entitled to a death benefit although she had not filed an application; that Mrs. Ewers testified that the Petitioner showed her a check, blank as to the amount and signed by him as Secretary-Treasurer, and asked her to endorse on the back and paid her at the time $100.00 in cash. The Petitioner in his testimony indicated that the check was made out in the sum of $500.00 in her presence before the endorsement by her. She did not recall signing any other paper although on cross examination she admitted that the application bore her signature; that the check so made out as above indicated was cashed by the Petitioner, he holding the $400.00 to await the determination as to whether or not Mrs. Ewers was entitled to $500.00 or $600.00 as a result of an amendment to the Constitution and By-Laws of the Association.

A Mrs. Greene, daughter of Mrs. Ewers, testified that on learning of the Petitioner's visit to her mother she telephoned him and took him to task for indicating that the amout due was $500.00 instead of $600.00. As a re-

sult of the heated conversation had with the daughter the Petitioner that day wrote a letter to Mrs. Ewers indicating that the balance would be paid to her at any time she came in to see him but that he would not again go to her residence. Mrs. Ewers received an additional $500.00 a few days later after a special meeting of the Board of the Association at which it was determined that she be given $600.00 instead of $500.00 as provided for in the amended Constitution and By-Laws of the Association. On cross examination of an officer of the Association, testifying on behalf of the Government, it was indicated that the Petitioner was complimented for his handling of this matter and that it was perfectly proper that he should not give the $600.00 until there had been approval by the Board, (Tr. 175-176).

The Petitioner testified that both Mrs. Thrasher and Mrs. Ewers had failed to file applications for death benefits due them, which applications should have been filed within one year of the death; that he made the partial payments to them because he felt they were entitled to the money; that he made the checks out for the full amount for bookkeeping purposes and that he held the balance in a safe at his home awaiting the necessary papers from the applicants and that each of the applicants were told that the balance would be paid when detail was completed. He further testified that the Thrasher application which was actually signed on April 18, 1956 was dated August 12, 1954 in order to avoid any question as to the time of the application. The Petitioner further testified that these claims were paid by him at the particular time because the relief association operation was expected to be taken over by the Federal Government and he desired to clear up outstanding claims.

At the outset of the trial Petitioner through his counsel moved that the prosecution be required to elect on which counts it would stand. This motion was renewed at the

end of the prosecution's case and again at the end of the entire case. In all instances the motion was denied by the Trial Court. Moreover, the Petitioner through his counsel moved for a Judgment of Acquittal on the basis that if the evidence was to be in any wise interpreted against the Petitioner that it had to be on the basis that the monies involved were the property of the two ladies and not the Association. This motion likewise was denied by the Court and the same was renewed at the end of the entire case and denied by the Court. The Petitioner through his counsel also moved for a Judgment of Acquittal on the third and fourth and the seventh and eighth counts of the indictment charging forgery and uttering. The Court granted the motion as to Counts 3 and 4 and overruled the motion as to Counts 7 and 8.

The Court instructed the jury that they could not convict in the respective transactions on both embezzlement and larceny, that they could acquit on both counts but if they determined guilt it could only be on one or the other.

The jury received the case at 3:17 P.M. on the fourth day of the trial. At 6:05 P.M. the jury after being sent for by the Court reported that they were in disagreement; the Trial Judge then asked the foreman if they had agreed on any counts and he replied that they had agreed on counts 1 and 2. Thereupon, the Court took the partial verdict of the jury in which it was indicated by the foreman that they found the Petitioner guilty on counts 1 and 2, embezzlement and grand larceny in connection with the Thrasher funds. At this point counsel were called to the Bench and counsel for Petitioner moved for a mistrial which was denied. The Court then sua sponte had the jury polled on count 1 in which it was indicated that each of the jurors found the Petitioner guilty on Count 1. The Court did not require a poll of the jury on Count 2 but rather sua sponte directed the

entry of a verdict of not guilty on count 2. (Appellant's Appendix 26-28)

The Court then excused the jury with directions to return the following morning. The Court on the following morning without request from either the prosecutor or counsel for the Petitioner re-charged the jury as to counts 5 through 8. At the outset of his re-charge to the jury he stated that "in the light of what transpired on last evening, the Court has concluded to re-charge you" The jury after two hours of further deliberation returned a verdict of not guilty on the remaining counts—5 through 8—which involved the Ewers fund.

The Petitioner through his counsel timely filed Motion for New Trial and or Judgment Non Obstante Verdicto which after argument was taken under advisement by the Court. Approximately one month later the Trial Court overruled the Petitioner's above Motions and the opinion of the Trial Judge is reported in 149 F.Supp. 409.

The decision by the United States Court of Appeals for the District of Columbia Circuit (App. 52) being less than one page and containinng two paragraphs merely notes errors urged and affirmed the lower court without setting forth any reasons or citations of law.

REASONS FOR GRANTING THE WRIT

I.

The Trial Court Erred In Not Requiring The Prosecution To Elect As To Counts And Such Action By The Court Worked A Prejudice To The Petitioner As Is Demonstrated By the Final Action Of The Jury.

The Petitioner through his counsel on the occasion when the prosecutor completed his opening statement to the jury, moved the Court that the prosecution be required to elect as to which theory it proposed to urge to the jury

and to the Court and that the Petitioner could not possibly be guilty of the different theories set forth in each group of counts. (Tr. 33). This Motion was renewed at the end of the prosecution's case (Tr. 278) and of the entire case and in all instances the Trial Court denied the Motion.

It is the Petitioner's contention that this failure to require the prosecution to elect was necessarily a strong factor in the manifest confusion of the jury and contributed to the verdict returned in defiance of the Trial Court's instructions.

The United States Court of Appeals for the District of Columbia Circuit in *Dobbins* v. *United States*, 81 U.S. App.D.C. 218, 220, stated:

> "Likewise, we do not think the Trial Court erred in refusing the defendant's Motion that the Government be required to elect to place its case on one of the three crimes charged before putting in evidence. This matter is within the discretion of the Trial Court and its ruling was not an abuse of that power. As for any confusion which might have existed as a result of the prosecution being allowed to put in its case before making an election, *we think it was well dispelled by the election at the end of the Government's case and by the instructions to the jury. There is nothing to indicate that the defense was in any way damaged by this ruling of the Trial Court.*" (Emphasis supplied.)

In the instant case as distinguished from the *Dobbins* case (supra), the Trial Court at no time required an election and the result eloquently demonstrates that there was at no time any dispelling of the confusion and therefore as indicated in the *Dobbins* case (supra) the defense was damaged by this ruling of the Trial Court.

Moreover, in this connection it should be borne in mind that the Trial Court in instructing the jury advised that they could convict only on one or the other of Counts 1

and 2 or 5 and 6 but likewise advised the jury that having convicted on one or the other of those counts they could convict on either the 7th or 8th count. It so happened that the jury was ultimately instructed to return a verdict of not guilty on Counts 3 and 4 and after resubmission returned a verdict of not guilty on Counts 5 and 6 as well as Counts 7 and 8. However, in submitting the case originally on the basis that the jury could convict on either embezzlement or larceny and on forgery and uttering, the Court further increased the possibilities of confusion on the part of the jury. Under the facts in this case the crime if any was either embezzlement, larceny, or forgery and not such as was indicated in this case. See *Yeager v. United States*, 59 App.D.C. 11, 32 F.2d 402.

II.

The Trial Court Erred In Denying Petitioner's Motions For Judgment Of Acquittal Because The Evidence Demanded Such.

At the end of the prosecution's main case the Petitioner through his counsel moved the Trial Court for Judgments of Acquittal as to each and all of the Counts (Tr. 277-327).

It was the contention of the Petitioner that not only was there a failure of proof either from the viewpoint of embezzlement and larceny but as well that there was a complete lack of proof to in any wise suggest a forgery and uttering. Moreover, the Petitioner contended as to the larceny and embezzlement counts that under any circumstances that the money involved had come to be the money of the respective payees and therefore that as far as Counts 1, 2, 5 and 6 were concerned which were embezzlement and larceny that there was a fatal variance since the indictment alleged the money to be the money of the Association.

In the case of *Johnson* v. *United States*, 190 F.2d 673, 676, the Court in announcing what is well established law stated:

> "In Wesson v. United States, supra, we reversed a conviction based upon circumstantial evidence. In the course of that opinion we among other things said (172 F.2d 933): 'Inferences must be based upon proven facts or facts of which judicial notice must be taken and one inference cannot be based upon another inference. To sustain a finding of fact the circumstances proved must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference, and not mere suspicion. Circumstantial evidence, even in a civil case, is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion or where they give equal support to inconsistent conclusions.'"

It was the contention of the Petitioner in connection with the Motions for Judgment of Acquittal that under the circumstances of the case the charge of embezzlement was not well founded.

In the case of *Yeager* v. *United States* (supra), the Court held on facts quite similar to the instant case that the evidence if it supported any theory it was forgery and not embezzlement. Judge Van Orsdel speaking for the Court stated:

> "So here, the crime against defendant's employer did not consist in drawing the bank's money and appropriating it to his own use, but in the use of his employer's name in an unauthorized manner to convert an otherwise valid check into a forged and fraudulent instrument."

III. and IV.

The Trial Court Erred in Denying Petitioner's Motions For Judgment Of Acquittal Because of Fatal Variance In That The Proof As To Counts 1, 2, 5 and 6 Showed The Money To Be The Property Of The Payees And Not Of The Association.

The Trial Court Erred In Instructing The Jury That Ownership Of The Money Could Be In Either The Association Or The Payees Notwithstanding The Indictment Charged The Ownership in Counts 1, 2, 5 and 6 in the Association.

The Trial Court in overruling the Motion for Judgment of Acquittal on the basis that the evidence disclosed ownership in the payees rather than in the Association took the same position as it did later in charging the jury, namely, "that although all four embezzlement and larceny counts alleged the money to be the property of the Association it would not be fatal to conviction if the jury should find the money to be that of the payee of the check." The foregoing is the exact language used by the Trial Judge in his opinion as it appears at page 412, 149 F.Supp.

The Trial Judge as is further indicated in his opinion (supra) endeavors to justify his position on a suggestion that the principle as to variance had been relaxed in Federal Rules of Criminal Procedure 52(a) and as same has been interpreted in certain indicated cases.

The rule did not obviate and the cited cases still hold to the effect that where a variance affected the substantial rights of the accused, then the variance is still fatal.

The Trial Judge also in his memorandum at page 412 (supra) endeavors to discount the weight of the case of *Heath v. United States*, (9th Cir.) 29 F.2d 318, cited by the Petitioner on the basis that the statute, there involved,

made government ownership an essential element of the offense charged. In this connection it would seem fundamental and not require citation that by statute or otherwise a most important element in the crime of embezzlement and larceny is that of ownership and the crimes of necessity contemplate the deprivation of the true owner or holder of such ownership.

In the case of *Cartwright v. United States*, 146 F.2d 133, the Court points out that the government, having chosen to allege in indictment that property stolen was property of the United States, did not discharge its burden of proof by showing that property belonged to defense plant corporation stock of which was owned by the United States. In this connection Judge Hutcheson stated as follows:

> "The Government's position that this is a mere technicality since the United States beneficially owned the stock of the corporation, and, therefore must be considered to be the owner of its property, will not at all do."

See also:

Lau Fook Kau v. United States, 30 F. 2d 86;
Cutler v. United States, 79 F.2d 440;
United States v. Hunter, 123 F.Supp. 1.

V.

The Jury's Verdict Of Guilty On Counts 1 and 2 Was Not Only Against The Instruction Of The Court But Represented Contradictory Interpretation Of The Evidence.

The Trial Judge in his original charge (App. 10) (Tr. 640) and again as disclosed in his recharge (App. 36) (Tr. 722), advised the jury that it could not return a verdict of guilty on both the first and second counts or on both the fifth and sixth counts of the indictment. This charge was given for the manifest reason that the two

theories were antagonistic and inconsistent and therefore that there could not be guilt under both theories.

The Trial Judge called the jury back into the courtroom after approximately three hours of deliberation. The jury was asked if they had agreed upon a verdict and the foreman indicated that they had not. (App. 25) (Tr. 662). Thereupon, the Court inquired of the foreman "Have you reached a verdict as to any of the counts in this case," to which the foreman replied "Yes, we have, Your Honor" (App. 25) (Tr. 662). The Court then directed the Clerk to take the verdicts whereupon the foreman on behalf of the jury indicated that they found the defendant guilty on the first count which charged embezzlement and then indicated that they found the defendant guilty on the second count (App. 25) (Tr. 663) which charged larceny which pronouncement by the foreman was confirmed by the jury. (App. 25) (Tr. 663). Thereupon, the Trial Judge called counsel to the Bench at which time the Court pointed out that its instruction was "that they cannot find him guilty—are these both in the same case?" (App. 26) (Tr. 663). Thereupon, counsel for the Petitioner stated "That's right. It is the situation you told them they could not return a verdict on both counts." Then the Court replied "That's right" (App. 26) (Tr. 663-664).

At this point counsel for the Petitioner, after moving for mistrial, suggested to the Court that he did not conceive there was any way of correcting the situation without prejudice to the defendant. The Court then said "I am going to instruct the jury that their verdict cannot be on both, and if [illegible]" (App. 26) (Tr. 664) " * * * but I think it is my duty to instruct them further under the charge which I gave that if they found him guilty as to embezzlement that they could not find him guilty as to larceny. Therefore, their verdict having been guilty as to count 1, which is embezzlement it could not be guilty as

to count 2, and I will of my own volition ask the Clerk to poll the jury as to count 1 and see what they reply." (App. 26-27) (Tr. 665).

It is to be noted at this point that the Court said that he was going to re-instruct the jury with a view of correcting the verdict but he did not do it. Instead, the Clerk under the direction of the Trial Judge polled the jury on the first count and it was indicated that they found the Petitioner guilty. Thereupon, without any further suggestion to the jury, the Court set aside the verdict on count 2. At this point counsel for the Petitioner objected to the Court's selecting the count as to which the verdict of guilty is to stand and did so on the basis that the Court was usurping the function of the jury. (App. 28) (Tr. 667).

It would seem unnecessary to argue the fact that the jury's return of a verdict of guilty on counts 1 and 2 was not only inconsistent but antagonistic. The action of the Trial Court itself confirms the fact that the verdicts rendered by the jury were inconsistent and antagonistic. The fact remains however of record and beyond dispute that such was the action of the jury.

The situation as it developed points up the merit in the Motions for election made throughout the entire case. Moreover, the subsequent action of the Court amounts to an arbitrary election after the jury action and thereby eliminated the jury from any functioning in the case.

VI. and VII.

The Trial Judge Erred In Accepting The Verdict Of Guilty On Embezzlement And Of His Own Motion Entering A Verdict Of Not Guilty On Larceny. The Least That Should Have Been Done Was To Direct The Jury To Reconsider In The Light Of Instruction Given.

The Trial Judge Erred By Invading The Province Of The Jury In That Thereby He Denied To The Petitioner His Right To Trial By Jury.

In the light of the foregoing it becomes immediately apparent that the Petitioner's rights under Article III, Section 2 (Paragraph 3) and the Sixth Amendment to the Constitution were denied because the Court infringed the function of the jury. Article III, Section 2 (Paragraph 3) provides:

> "The Trial of All Crimes, except in cases of Impeachment, *shall be by Jury;* and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." (Emphasis supplied)

The Sixth Amendment reads as follows:

> "In all criminial prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." (Emphasis supplied)

The Trial Judge in his opinion at page 414, 149 F.Supp., states as follows:

> "On the other hand, where a guilty verdict on one count negatives some fact essential to a finding of

guilty on a second count, two guilty verdicts may not stand. Fulton v. United States, supra, 45 App.D.C. at page 41; Davis v. United States, 37 App.D.C. 126, 133."

In both the *Fulton* and *Davis* cases (supra) the Court of Appeals in reversing the cases remanded them for new trial and not with any instructions to the Court to enter a verdict of guilty on any one count.

The Petitioner contends that for the very reasons indicated in the *Fulton* and *Davis* cases (supra) the Trial Judge should not have taken over the function of the jury and resolved the improper verdict of the jury. If he would not discharge the jury because of a total lack of comprehension of the instructions given then at least he should have re-instructed them and directed them to reconsider those counts and return verdicts consistent with his further instructions.

The gauge of this situation was given the next morning after the first report of the jury when the Trial Judge felt the necessity for re-charging the jury on the law of the case. Most significantly, at the outset of his re-charge he stated:

> "*Ladies and Gentlemen, in the light of what transpired on last evening, the Court has concluded to re-charge you.*" (App. 31) (Tr. 713) (Emphasis supplied)

In the case of *United States* v. *DiMatteo*, 169 F.2d 798, 801, almost the identical situation is presented. Judge Biggs in the opinion stated:

> "The jury probably meant to find the defendant guilty on the first count. We could perhaps rule that the jury returned a verdict of 'guilty' on the first count. But *a defendant* on trial on an indictment in a court of the United States *is entitled*, if judgment of sentence is to be imposed on him, *to have his guilt found by a verdict thus and specifically*, and *not by way of possible inference*." (Emphasis supplied)
>
> " . . . what transpired in substance was that *the*

> *court itself rendered a verdict of 'guilty' on the first count and a verdict of 'not guilty' on the second count.* The court was without authority to grant the motion and in doing so it usurped the function of the jury in violation of the Third Article and the Sixth Amendment of the Constitution of the United States which guarantee trial by jury to the defendant." (Emphasis supplied)

Again in the *Di Matteo* case (supra) the Court further states:

> "The trial judge stated to the jury on its return with the verdict that the verdict was 'laughable' and also said 'I think you didn't understand this case at all * * *.' Despite these characterizations of the verdict voiced immediately on the return of the jury the court below ten days later denied the motions for arrest of judgment and for a new trial. The motions do not raise directly any question respecting the jury's lack of understanding of the case but did so very indirectly, by inference as indicated above. For this reason it may not be plausibly asserted under the circumstances of the case at bar, that by denying the motions the court rejected its earlier characterizations of the verdict. We must agree with the observation made by the trial court that the jury did not understand the case at all for that fact is demonstrated clearly by the record Moreover, when an experienced trial judge, declared that a jury returning a verdict to him did not understand the case at all that fact alone necessitates a new trial. A defendant on trial is entitled to a jury which at least, or at worst, possesses sufficient understanding of the circumstances of the case to return a pertinent, adequate and coherent verdict."

At this point it seems desirable to again recall that the Trial Judge in this case said at the outset of the re-charge of the jury:

> "Ladies and Gentlemen, in the light of what transpired on last evening, the Court has concluded to re-charge you." (App. 31) (Tr. 713)

Surely it is most apparent that the Trial Judge himself believed that the jury did not understand his first charge.

It should be observed also that after the re-charge and at a time when the jury apparently had come to understand what the Court had charged there was a ready return by the jury with verdicts of not guilty on the remaining counts. (App. 50)

The Trial Judge in his opinion denying the Motion for New Trial and/or Judgment Non Obstante Veredicto at page 414, 149 F.Supp., suggests that his action was justified under Rule 29(a) and (b) of the Federal Rules of Criminal Procedure.

It is respectfully suggested that said Rule was never intended to accomplish the denial of right to jury trial under the Constitution (supra) and does not under any circumstances justify the direction of a verdict of guilty. (*Billeci, et al* v. *United States*, 87 U.S.App.D.C. 274, 184 F.2d 394).

The Trial Judge in the same opinion at page 415 states:

> "Courts have the power also to correct any uncertainty in a verdict before discharging the jury. Bernhardt v. United States, 6 Cir., 169 F.2d 983, 985, certiorari denied 335 U.S. 903, 69 S.Ct. 407, 93 L.Ed. 437; Shiflett v. Welch, 4 Cir., 161 F.2d 933, 934, certiorari denied 332 U.S. 777, 68 S.Ct. 41, 92 L.Ed. 362, rehearing denied 332 U.S. 845, 68 S.Ct. 264, 92 L.Ed. 416; Anderson v. United States, 2 Cir., 294 F. 593, 597."

Petitioner concedes that the Court has the right to endeavor to accomplish the return of proper verdicts justified under the evidence. All of the above cases cited point to the fact that the procedure is for the Court to readvise and re-charge the jury and then permit the jury after due consideration to return a verdict or verdicts in the light of the Court's further instructions. Such a

procedure is not one that contemplates the Court performing the function of the jury, namely, determining the fact.

See also:

Grace v. *United States*, 4 F.2d 658, cert. denied 268 U.S. 702;
Jay v. *United States*, 35 F.2d 553;
Shiflett v. *Welch*, 161 F.2d 933, cert. denied 332 U.S. 777, 332 U.S. 845.

VIII.

The Opinion Of The United States Court of Appeals For The District Of Columbia Circuit (App. 52) Does Not Meet The Requirements As To Appellate Court Function.

The decision of the Appellate Court is contained in one page stating " * * * we find no error effecting substantial rights of the appellant." (Pet. App. 22)

The Petitioner respectfully suggests to this Honorable Court that the errors assigned in this case are substantial and said errors were properly preserved in the Trial Court. The failure of the Appellate Court to meet the challenge of these substantial questions represents a denial of true justice to this Petitioner.

Such action by the Appellate Court it is respectfully urged would never be justified. In this case involving as it does 28 years of honorable service by the Petitioner in the Fire Department of the Nation's Capital with all the rights of pension and other benefits attendant thereon, makes the failure to support the Court's decision by a full opinion a more extreme denial of justice to the Petitioner.

In 21 C.J.S., Section 217, page 403, 404, the principle herein involved is generally stated as follows:

"However, even though an opinion is not required by statute, one should be written when the case involves the application of an old principle, a restatement of which is necessary, or where the question is one of great public interest or importance or difficulty."

In this connection the situation of a jury returning a verdict not only on inconsistent but antagonistic counts of an indictment notwithstanding the instruction of the Trial Court is novel and has never been passed upon in this jurisdiction. Involving as it does the Constitutional guarantee of right to trial by jury it should have merited a pronouncement by the Appellate Court.

The other suggested errors contributing as they did to the ultimate confusion of the jury should likewise have caused the Appellate Court to meet the challenge in detail.

This Honorable Court in *Public Service Commission* v. *Wisconsin Telephone Company*, 289 U.S. 67-71, 77 L.Ed. 1036, stated:

> "We have repeatedly emphasized the importance of a statement of the grounds of decision, both as to facts and law, as an aid to litigants and to this court."

Likewise in the case of *B & O Railroad Co.* v. *U.S.*, 279 U.S. 781-782, 73 L.Ed. 954, this Honorable Court said:

> "The questions were important and the amounts involved were large. The judges should have given the reasons on which they rested their decisions."

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

William H. Collins
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Washington 5, D. C.

APPENDIX

Filed Oct. 3, 1957. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 13785

EMILE J. DAIGLE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided October 3, 1957

Mr. William H. Collins for appellant.

Mr. E. Tillman Stirling, Assistant United States Attorney, with whom *Mr. Oliver Gasch*, United States Attorney, and *Messrs. Lewis Carroll* and *Joel Blackwell*, Assistant United States Attorneys, were on the brief, for appellee.

Before PRETTYMAN, WASHINGTON and BURGER, Circuit Judges.

PER CURIAM: Appellant was indicted in eight counts. The alleged offenses involved two transactions. As to each transaction the indictment charged, in successive counts, (1) embezzlement, (2) larceny, (3) forgery of a check, and (4) uttering of a forged check. He was convicted on the first count and given a sentence of imprisonment, which was suspended.

Appellant urges error in the failure of the court to require the prosecution to elect as to counts, in the denial of motions for judgment of acquittal,[1] in the court's instructions to the jury, in the return by the jury of an inconsistent and antagonistic verdict, and in the court's action in receiving a verdict of guilty on one count and directing a verdict of not guilty on another count. We have carefully considered the contentions, pressed upon us vigorously by counsel, but we find no error affecting substantial rights of the appellant.

Affirmed.

[1] See United States v. Daigle, 149 F.Supp. 409 (1957).

Filed Oct. 3, 1957. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 13,785

April Term, 1957.

Criminal 1122-56

EMILE J. DAIGLE, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the District of Columbia

Before: PRETTYMAN, WASHINGTON and BURGER, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Curiam.

Dated: October 3, 1957